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In The
Supreme Court of the United States

MICHAEL R. LEVY, AS INDEPENDENT
EXECUTOR OF THE ESTATE
OF MEYER LEVY, DECEASED,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether this Court's holding in *Daubert* permits the trial court to admit as evidence a retrospective opinion valuing real property which relies on methodology newly created for this case that did not consider the sales comparison approach, the cost approach or the income approach, was never subject to peer review, and was never published.

Additionally, should the initial prong of the trial court's *Daubert* gate-keeper function be reviewed *de novo* by the appellate court to promote consistency within the circuits?

If after agreeing 26 U.S.C. section 2032 applies, the Government attempts to establish a greater value than that declared by an estate on the alternate valuation date, does the Government have the burden under 26 U.S.C. section 2032 to also prove that the new value it is advocating is less than the estate's value as of the date of death? In light of the Government's affirmative defense, what is the proper application of 26 U.S.C. section 7491 to the allocation of the parties' burden of proof for affirmative defenses raised by the Government?

Where, as a matter of law, a limited partnership complies with 26 U.S.C. section 2036 and applicable state law establishing a lack of control by a Testator, can the discount applied for lack of control and/or marketability, to determine the fair market value of its limited partnership interests, ever be zero?

PARTIES TO THE PROCEEDINGS

Pursuant to Rule 14.1(b), the caption contains the list of all parties appearing here and before the United States Court of Appeals for the Fifth Circuit. The petitioner is not a corporation.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	vi
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	1
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE PETITION	10
ARGUMENT	14
A. The decision of the court of appeals in admitting an expert's opinion that relied on methodology that had not been published, subjected to peer review, or tested conflicts with *Daubert*	14
B. The trial court abrogated its gate-keeping function	16
C. The abuse of discretion standard should not apply to the first prong of the *Daubert* analysis	18

TABLE OF CONTENTS – Continued

Page

D. The Fifth Circuit's decision is irreconcilable with 26 U.S.C. section 2036 because the Limited Partnership met all of the tests demonstrating lack of control and lack of marketability 25

E. The decision of the Fifth Circuit is at odds with Texas statutes and 26 U.S.C. section 2036 26

F. The decision of the Fifth Circuit is contrary to the application of 26 U.S.C. section 2032 27

G. The proper application of 26 U.S.C. section 7491 30

CONCLUSION 32

APPENDIX

Opinion of the United States Court of Appeals for the Fifth Circuit in *Michael R. Levy, as Independent Executor of the Estate of Meyer Levy, Deceased v. United States of America*, No. 09-51082 ..... App. 1

Order of the United States District Court for the Western District of Texas, Austin Division, in *Michael R. Levy, as Independent Executor of the Estate of Meyer Levy, Deceased v. United States of America*, Cause No. A-07-CA-339-LY ..... App. 19

TABLE OF CONTENTS – Continued

Page

Final Judgment of the United States District Court for the Western District of Texas, Austin Division, in *Michael R. Levy, as Independent Executor of the Estate of Meyer Levy, Deceased v. The United States of America*, Cause No. A-07-CA-339-LY ..... App. 25

Order Denying Petition for Rehearing of the United States Court of Appeals for the Fifth Circuit in *Michael R. Levy, as Independent Executor of the Estate of Meyer Levy, Deceased v. United States of America*, No. 09-51082 ..... App. 28

26 U.S.C. §2032, Alternate Valuation ..... App. 29

26 U.S.C. §2036, Transfers with Retained Life Estate ..... App. 32

26 U.S.C. §7491, Burden of Proof ..... App. 34

TABLE OF AUTHORITIES

Page

CASES

Ahmanson Foundation v. United States, 674 F.2d 761 (9th Cir. 1981) 31

Cummins v. Lyle Indus., 93 F.3d 362 (7th Cir. 1996) 19

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) ..... *passim*

Eskra v. Provident Life & Acc. Ins. Co., 125 F.3d 1406 (11th Cir. 1997) 21

First Marblehead Corp. v. House, 541 F.3d 36 (1st Cir. 2008) 20

General Electric Co. v. Joiner, 522 U.S. 136 (1997) 19

Gregory v. Helvering, 69 F.2d 809 (2d Cir. 1934), *aff'd*, 293 U.S. 465 (1935) 9

In re Joint Eastern & Southern District Asbestos Litigation, 52 F.3d 1124 (2d Cir. 1995) 19

In re Scrap Metal Antitrust Litigation, 527 F.3d 517 (6th Cir. 2008) 21

Joiner v. General Electric Co., 78 F.3d 524 (11th Cir. 1996) 19

Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137 (1999) 4, 16, 17

Marine v. C.I.R., 92 T.C. 958 (1989), *aff'd, without published opinion*, 921 F.2d 280 (9th Cir. 1991) 24

TABLE OF AUTHORITIES – Continued

Page

Mars v. United States, 25 F.3d 1383 (7th Cir. 1994) 19

MEMC Elect. Mat'ls v. Mitsubishi Mat'ls Silicon Corp., 248 Fed. Appx. 199 (Fed. Cir. 2007) 21

Raynor v. Merrell Pharma. Inc., 104 F.3d 1371 (C.A.D.C. 1997) 21

Synergetics Inc. v. Hurst, 477 F.3d 949 (8th Cir. 2007) 21

United States v. 75.13 Acres of Land, 693 F.2d 813 (8th Cir. 1982) 24

United States v. 3698.63 Acres of Land in Burleigh, Emmons, and Morton Counties, North Dakota, 416 F.2d 65 (8th Cir. 1969) 24

United States v. Dorsey, 45 F.3d 809 (4th Cir. 1995) 17

United States v. Janis, 428 U.S. 433 (1976) 30

Waldorf v. Shuta, 142 F.3d 601 (3d Cir. 1998) 21

Walker v. Soo Line RR Co., 208 F.3d 581 (7th Cir. 2000) 18

Weisgram v. Marley Co., 528 U.S. 440 (2000) 14, 15, 17

Westberry v. Gislaved Gummi AB, 178 F.3d 257 (4th Cir. 1999) 17, 21

Zarega Ave. Realty Corp. v. Horbeck Offshore Transp. LLC, 571 F.3d 206 (2d Cir. 2009) 20

TABLE OF AUTHORITIES – Continued

Page

STATUTES

26 U.S.C. §2031 ..... 1, 2, 25

26 U.S.C. §2032 ..... *passim*

26 U.S.C. §2036 ..... *passim*

26 U.S.C. §7491 ..... *passim*

TEX. BUS. ORGS. CODE ANN. §153.102(a)(2) (Vernon 2006) 12

OTHER AUTHORITIES

Subchapter A, section 1.170A-1(c)(2) of the Treasury Regulations 24

PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael R. Levy, as Independent Executor of the Estate of Meyer Levy, Deceased, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in 09-51082.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is published at 2010 WL 4942108 (5th Cir. 2010). The opinion was not selected for publication in the federal reporter.

JURISDICTION

The Court of Appeals filed its opinion on December 1, 2010. The Motion for Rehearing was denied on January 26, 2011. This Court has jurisdiction pursuant to 28 U.S.C. section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves provisions of 26 U.S.C. section 2031(a), 26 U.S.C. section 2032, 26 U.S.C. section 2036 and 26 U.S.C. section 7491. The pertinent provisions are reproduced below:

Definition of Gross Estate

(a) General

The value of the gross estate of the decedent shall be determined by including to the extent provided for in this part, the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated.

26 U.S.C. §2031(a).

(c) Election must decrease gross estate and estate tax

No election may be made under this section with respect to an estate unless such election will decrease –

(1) the value of the gross estate, and

(2) the sum of the tax imposed by this chapter and the tax imposed by chapter 13 with respect to property includible in the decedent's gross estate (reduced by credits allowable against such taxes).

26 U.S.C. §2032(c).

(a) General rule

The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, under which he has

> retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death –
>
> > (1) the possession or enjoyment of, or the right to the income from, the property, or
> >
> > (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom.

26 U.S.C. §2036(a).

> **(a) Burden shifts where taxpayer produces credible evidence**
>
> **(1) General rule**
>
> If, in any court proceeding, a taxpayer introduces credible evidence with respect to any factual issue relevant to ascertaining the liability of the taxpayer for any tax imposed by subtitle A or B, the Secretary shall have the burden of proof with respect to such issue.

26 U.S.C. §7491(a)(1).

STATEMENT OF THE CASE

The United States Court of Appeals for the Fifth Circuit has decided an important federal question in a way that has so far departed from the accepted and usual course of judicial proceedings as to call for an

exercise of this Court's supervisory power. The United States Court of Appeals for the Fifth Circuit has rendered a decision in conflict with the decisions of this Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999).

The expert in this case offered an opinion of the retrospective fair market value of real estate. To derive his opinion, he did not use the uniformly adopted methodologies: sales comparison approach, cost approach or income approach. Instead, the expert relied on non-binding, expressions of interest to support his opinion. The expert also testified that his chosen methodology had not been published, subjected to peer review or generally used within the appraisal field. To compound the error, the expert was also permitted to rely on and the jury learned through the evidence of the ultimate sale of the property that occurred thirty-nine months after the decedent's death and also contemplated changes of such magnitude that it barely resembled the character of the property as of the date of death. In addition to objecting to the methodology, the Estate objected that the evidence of the sale was too remote in time and also not the type of data reasonably relied upon by appraisers. Yet, over objection, the trial court admitted the opinion as evidence. By sanctioning the decision of the trial court, the Fifth Circuit demonstrates that the courts of appeal need additional guidance and supervision with respect to the very important gatekeeping function of the trial court in permitting

expert testimony. The importance of this decision is evident by the response in the real estate appraisal community recognizing the opinion as sanctioning a new methodology for retrospective real estate valuation that does not consider the sales comparison approach, cost approach or income approach.

Additionally, to promote consistency among the decisions within a circuit and between the various circuits, the appellate review of a trial court's *Daubert* analysis should be *de novo* with respect to whether the district court properly analyzed and determined that the methodology used by the expert was appropriately reliable under the circumstances. The second prong of the analysis, the actual admission or exclusion of the opinion based upon its relevance should remain an abuse of discretion standard of review.

The traditional interpretation of sections 2032 and 2036 of the Internal Revenue Code permitted the citizens of this nation to manage their assets with confidence. Absent guidance from this Court, the recent decision from the Fifth Circuit Court of Appeals will erode taxpayer confidence such that our citizens are no longer able to reliably value their real property, their partnership interests or their estates.

When faced with the task of applying discounts to minority interests for lack of control and/or marketability, the trial court's focus is generally on the magnitude of the discount, not whether one is appropriate. However, this Court has never addressed this issue definitively. The decision of the Fifth Circuit to

permit *no* discount to be applied to the value of a minority interest despite the taxpayer having satisfied 26 U.S.C. section 2036, as a matter of law, is contrary to the decisions of other courts faced with this issue. This Court needs to address this issue and give guidance to the lower courts.

In 1955, Meyer Levy purchased nearly 100 acres of farmland in what is now part of Plano, Texas. In December 1997, Mr. Levy transferred the ownership of a portion of the still undeveloped property to a limited partnership ("Limited Partnership") in order to maintain uniform management of the parcel of land. Upon his death, the remaining Limited Partnership interests were included in his Estate.

As part of the Estate's administration, the Estate hired appraisers to determine the fair market value of the still undeveloped real property. Other appraisers were asked to determine the fair market value of the Estate's general partner interest and the assignee limited partner interest in the Limited Partnership. Because the value of the Estate declined during the six-month period after Mr. Levy's death, in accordance with the Internal Revenue Code, the Estate properly selected the alternate valuation date of September 25, 2001 for federal estate tax purposes.

The Estate timely filed a Form 706 United States Estate Tax Return ("Form 706 tax return") and paid over $1.3 million in estate taxes. Subsequently, the IRS conducted an audit of the Form 706 tax return. Nearly four years after the date of Mr. Levy's death,

in February 2005, the Estate and IRS entered into an agreed adjustment, using a 30% discount (for lack of marketability and lack of control) to determine the fair market value of the Limited Partnership interest. In reliance on that agreed adjustment, the Estate paid an additional $167,600.00 in taxes. Five weeks later, on March 31, 2005, and after receiving the additional tax, the IRS, learned of the sale of the property and took its third bite at the apple and sent the Estate a deficiency notice based on its new determination that the fair market value of the land was higher than reported on the Form 706 tax return and higher than the parties had preliminarily agreed to the previous February. The Estate paid the additional $3,236,377.00 in taxes under protest and then filed suit in May 2007 to obtain a refund of $4,107,600.00.

This case also involves the proper application of 26 U.S.C. section 7491 as it relates to the affirmative defenses asserted by the Government. Traditionally, the party asserting an affirmative defense has the burden of proof on that issue. In this case, the Government should have had the burden of proof pursuant to 26 U.S.C. section 7491 on its affirmative defense of offset even in a taxpayer refund case. In a tax refund case, the taxpayer has the initial burden and this Court has not addressed when the burden shifts in these circumstances with the application of section 7491.

The question of the proper application of the burden of proof is significant because the Government

did not present any expert witnesses or evidence on the issue of the proper discount for lack of control and/or lack of marketability. Therefore, if it had the burden of proof, it did not meet its burden and there was no evidence to support the jury's finding of zero discount which was completely at odds with the trial court's finding against the Government on its section 2036 affirmative defense.

This case of first impression creates this additional question: In determining whether 26 U.S.C. section 7491 applies, what or whose value is used when deciding whether a partnership, corporation or trust falls within the $7,000,000.00 value limit set out in the statute? This Court needs to address these issues to give guidance to the lower courts on these issues.

The plain language of 26 U.S.C. section 2032 requires that, by electing the alternative valuation date, the value of an estate and the associated tax *must* decrease. This interpretation of the statute is not disputed. However, in this case, the Fifth Circuit erred in the application of section 2032 and in assigning the burden of proof under section 7491. Both parties stipulated that the election under 26 U.S.C. section 2032 by this estate was proper. Thus, as required by the statute, at the time of trial, the value on the alternate value date must be less than the value as of the date of death.

At trial, the Government challenged the valuation as of the alternate valuation date, claiming it was much higher than the value as of the original

date of death claimed by the estate. Because the Government presented no evidence of value as of the date of death, the only evidence was from the Form 706 tax return. The unchallenged date of death value was *lower* than the new value as of the alternate valuation date sought by the Government. Without proof of an even higher date of death value, the Government loses in its attempt to increase the value as of the alternate value date. It is impossible to satisfy section 2032, which the Government stipulated had been properly elected, if the value on the date of alternate value is greater than the value as of the date of death.

The Government also asserted an affirmative defense of offset, claiming that 26 U.S.C. section 2036 applied because the Partnership had not been formed for a substantial, non-tax purpose and therefore alleged that the Limited Partnership interests be valued with no discount for lack of marketability or lack of control. Although since 1935, this Court has recognized the right and obligation of every citizen to minimize taxes,[1] the Government improperly recast Mr. Levy's actions to coordinate the management of

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[1] "Anyone may arrange his affairs so that his taxes shall be as low as possible; he is not bound to choose that pattern which best pays the treasury. There is not even a patriotic duty to increase one's taxes. Over and over again the Courts have said that there is nothing sinister in so arranging affairs as to keep taxes as low as possible. Everyone does it, rich and poor alike and all do right, for nobody owes any public duty to pay more than the law demands." *Gregory v. Helvering*, 69 F.2d 809, 810 (2d Cir. 1934), *aff'd*, 293 U.S. 465 (1935).

his assets into a nefarious scheme to deprive the Government of estate taxes.

After allowing the Government to offer evidence to support its section 2036 challenge to the validity of the Limited Partnership, the Court entered judgment as a matter of law in favor of the Estate on this issue, prior to the jury's deliberations. By so doing, the Court determined that the Limited Partnership had a valid, non-tax purpose. This determination has not been challenged.

The jury rendered its verdict on February 27, 2009. The Fifth Circuit affirmed on December 1, 2010 and denied the Estate's Motion for Rehearing on January 26, 2011.

REASONS FOR GRANTING THE PETITION

The decision of the Fifth Circuit so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. The Fifth Circuit made four fundamental errors in rendering its decision in the case below:

First, it abrogated the trial court's gate-keeping obligation set out in *Daubert*. It sanctioned the admission of an expert's opinion that relied on a invalid method: untested, unpublished, unaccepted, and never before used, despite the availability of well-recognized methodology. This approach reflects the trend among the lower courts to impermissibly rely

on the "vigorous cross examination" of the expert to enable the jury to discern the validity of the opinion. With this shift, the trial court is abrogating its responsibility as the gate-keeper that was imposed by this Court in *Daubert*. The affirmation of the trial court's decision under an abuse of discretion standard highlights the danger of inconsistency within the courts by preventing a *de novo* review of the methodology, which traditionally has been a question of law. This decision conflicts with decisions of its sister courts with respect to the proper methodology for retrospective valuation. The decision highlights the need for this Court to exercise its supervisory authority with regard to the appropriate *Daubert* analysis and impose a *de novo* standard of review on the initial prong of the *Daubert* analysis, *i.e.*, whether the methodology was properly (i) tested, (ii) subjected to peer review and published, (iii) used facts and data of a type reasonably relied upon by experts in this field, and (iv) is generally accepted in the field, in order to promote uniformity among the circuits.

The second and third errors resulted in a misinterpretation and misapplication of federal statutes, 26 U.S.C. sections 2032, 2036, and 7491. This Court should accept this Petition in order to decide these important federal questions that have not been but should be decided by this Court.

With respect to section 2032, a plain reading of the statute demonstrates that in order to elect an alternate valuation date, the value of an estate *and* the taxes it pays must decrease from the date of death value. After an estate properly elects the

alternate valuation date, if in litigation the United States seeks a greater value as of the alternate valuation date than that originally claimed by the taxpayer, the Government must present evidence of a value as of the date of death that is greater than the value, on the alternate value date, being sought. Only then will the requirements of section 2032 be satisfied.

In this case, the United States failed to present *any* evidence of the estate's value as of the date of death. The proper section 2032 election *and* a value on the alternate valuation date of an amount greater than as of the date of death resulted in an inconsistency that is in contravention of the statute. Subsumed within this question of statutory interpretation is the impact of the burden shifting required by 26 U.S.C. section 7491. This Court has not addressed this important issue and the courts of appeal that have addressed it are inconsistent in interpreting the statute to decide when and under what circumstances the burden should shift to the Government.

The Texas Business Organizations Code, a codification of the various Texas statutes governing entities, provides that limited partners are not liable to third parties for the obligations of the limited partnership unless * * * "the limited partner participates in the control of the business."[2] This is the backdrop for the Fifth Circuit's final error.

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[2] TEX. BUS. ORGS. CODE ANN. §153.102(a)(2) (Vernon 2006).

The final error occurred because no court has definitively held that, if a limited partnership complies with the laws of the state of its formation and was created for a substantial, non-tax purpose, then a discount greater than zero must be applied for lack of control and/or lack of marketability. All of the decisions focus on the *magnitude* of the discount, not *whether* a discount greater than zero is appropriate.

In this case, the Limited Partnership complied with Texas law. The trial court found it was created for a substantial, non-tax purpose. The jury found zero discount should be applied for lack of control and/or lack of marketability. The failure to find a discount value greater than zero in recognition of the lack of control and/or lack of marketability is contrary to Texas law as well as the operation of 26 U.S.C. section 2036.

These questions are important to uniform jurisprudence among the circuits. In the time since this Court last clarified *Daubert*, there is less uniformity in the standards by which an expert's opinion is deemed admissible. As more and more cases are decided on the admissibility of expert testimony, this important and recurring conflict should be resolved by this Court. Giving the trial court full discretion over all facets of the *Daubert* analysis has resulted in a greater abdication of the trial court's responsibilities under *Daubert* as demonstrated by the admission of an expert opinion that did not meet *any* of the criteria set out by this Court in a field where the accepted methodology is clear and well-known. With

respect to the interpretation of sections 2032, 2036, and 7491, this Court has not previously addressed the proper interpretation and application of these important statutes and the Court's guidance is necessary.

ARGUMENT

A. The decision of the court of appeals in admitting an expert's opinion that relied on methodology that had not been published, subjected to peer review, or tested conflicts with *Daubert*.

Since *Daubert* was decided in 1993, this Court has cited its holding thirteen times while discussing the admissibility of expert opinions. However, it has been some time since the Court has addressed this issue; the last case, *Weisgram v. Marley Co.*, 528 U.S. 440 (2000), was decided over ten years ago. In that case, Justice Ginsberg noted,

> Since *Daubert* moreover, parties relying on expert evidence have had notice of the exacting standards of reliability such evidence must meet.

(internal citations omitted).

Retrospective valuation of real property requires the application of the "exacting standards of reliability" that was the focus of *Daubert* and its progeny. However, with the decision in this case, at least in the Fifth Circuit, Justice Ginsberg's hopeful prediction is no longer reliable.

The primary issue in this case focuses on the reliability of the opinion even a supremely qualified expert should not have been able to render. The opinions presented to the jury did not even arguably meet the test set forth in *Daubert*. Despite this Court's seemingly clear instruction in *Weisgram*, in this case the Fifth Circuit permitted the trial court to admit an opinion based upon unpublished, untested and (not coincidentally) flawed methodology. The court admitted a retrospective valuation opinion of real property based upon a methodology that did not use the sales comparison approach, cost approach or income approach. The information relied upon by the expert did not even arguably fall within the ambit of "comparable sales", but rather were, for the most part, non-binding expressions of interest in the property contingent upon significant and unforeseeable changes in the character of the real property. The only sale upon which the expert relied was also not of the type reasonably relied upon by experts – it occurred thirty-nine months after the date of death and was contingent upon dramatic zoning changes and contingencies. However, the trial court and the Fifth Circuit overlooked this glaring deviation from the accepted appraisal methodology by deciding that there had not been significant market changes during that three and a half year period. Accepting this remote in time sale further demonstrates the failure of the court to accept its gate-keeping function and require the expert to base his or her opinion on the methodology that meets the *Daubert* criteria.

B. The trial court abrogated its gate-keeping function.

Ignoring this Court's direction, the trial court abandoned its *Daubert* gate-keeping responsibility and relied solely on vigorous cross-examination to attack the expert's opinion, which was both shaky and inadmissible. *See Kumho Tire Co.*, 526 U.S. at 158 (Scalia J. concurring). Reliance on cross-examination may be appropriate under certain circumstances, but it cannot properly be a substitute for the Court's *Daubert* analysis. This Court needs to reinforce that the trial court, not the jury, is the appropriate body to decide whether the expert's opinion meets the exacting *Daubert* standards.

Under the *Daubert* framework, the trial court acts as the gate-keeper for expert testimony, determining *prior* to admission whether the proffered opinion is both relevant and reliable. *See Kumho Tire Co.*, 526 U.S. at 141. The trial court's focus "must be solely on principles and methodology, not on the conclusions that they generate." *Daubert*, 409 U.S. at 595.

It is undisputed that experts' "opinions" have the potential to "be both powerful and quite misleading" to a jury whose members traditionally have more limited experience in scientific and technical fields. *Id.* at 595. "And, given the potential persuasiveness of expert testimony, proffered evidence that has a greater potential to mislead than to enlighten should be excluded" as part of the gate-keeper function. *See*

Westberry v. Gislaved Gummi AB, 178 F.3d 257, 261 (4th Cir. 1999), *citing United States v. Dorsey*, 45 F.3d 809, 815-16 (4th Cir. 1995). Permitting an expert's opinion to be based upon scientific or technical doctrines and/or methodology that do not meet the *Daubert* standard in the expert's discipline poses a threat to the very core of equity and the principles of due process. In recognition of the danger of these threats to the judicial process, this Court has stated that "the goal of *Daubert* is to assure that experts employ the same 'intellectual rigor' in their courtroom testimony as would be employed by an expert in the relevant field." *Kumho Tire Co.*, 526 U.S. at 152.

In the years since the Court's decision in *Weisgram*, the appellate courts, including the Fifth Circuit, have strayed from requiring an expert's opinion to satisfy the *Daubert* inquiry: whether the theory or technique can be and has been tested, been subjected to peer review and publication; whether the facts or data of a type reasonably relied upon by experts in that field forming opinions; and whether the theory or technique is generally accepted within the technical community. This Court needs to clarify and reaffirm the critical importance of the trial court's gate-keeper function as an *initial* consideration of the admissibility of the evidence, prior to the relevance determination.

C. The abuse of discretion standard should not apply to the first prong of the *Daubert* analysis.

The Fifth Circuit has adopted an abuse of discretion standard of review to *all* aspects of the trial court's analysis culminating in the admissibility or inadmissibility of the proffered opinion, even the issue of whether the *Daubert* analysis was properly conducted. The Seventh Circuit more properly reviews the initial prong of the trial court's *Daubert* analysis *de novo*. *Walker v. Soo Line RR Co.*, 208 F.3d 581, 586 (7th Cir. 2000). Rather than the "abuse of discretion" approach to every issue related to the admissibility of expert testimony, the Estate would suggest that this Court should clarify *Daubert* and determine that the Seventh Circuit's two-pronged approach, a standard of review for the *Daubert* analysis that differs from the standard of review of the sufficiency of the evidence, is preferable and affords more consistency in decisions among the Circuits. As justification for the *de novo* review of the first prong, whether the expert would testify as to valid scientific knowledge, the Seventh Circuit explained,

> since the reliability of an entire *class* of scientific evidence depends on considerations that transcend the individual case, the appellate court would feel free to consider the issue of reliability as one of general law applicable to all cases within its jurisdiction, as distinct from an issue within the discretionary power of the individual trial judge and

> hence bound to be applied differently in different cases.

Mars v. United States, 25 F.3d 1383, 1384 (7th Cir. 1994). The focus for this part of the analysis is whether the trial court properly applied the *Daubert* framework. In this case, the answer would be a resounding "no."

The second prong, "whether evidence or testimony assists the trier of fact in understanding the evidence or in determining a fact in issue" is reviewed for an abuse of discretion. *Cummins v. Lyle Indus.*, 93 F.3d 362, 368 (7th Cir. 1996).

The Seventh Circuit's approach is not inconsistent with this Court's holding in *General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997) and in fact, the Seventh Circuit also relies on *Joiner*. The *Joiner* Court was not asked, nor did it analyze the bifurcated review of expert testimony adopted by the Seventh Circuit. Rather, it appears from the opinion that the *Joiner* Court focused on the Eleventh Circuit's poor choice of words when it held "a particularly stringent standard of review" was required when the evidence was excluded by the trial court. *Joiner v. General Electric Co.*, 78 F.3d 524, 529 (11th Cir. 1996). Moreover, as recognized by the court in *In re Joint Eastern & Southern District Asbestos Litigation*, 52 F.3d 1124, 1132 (2d Cir. 1995), "admissibility" and "sufficiency" determinations require different inquiries and logically should have different standards of review.

This Court's *Daubert* decision clearly explained the process of determining whether an expert's opinion would meet the criteria of Rule 702 of the Federal Rules of Evidence. The opinion must be grounded in the methods and procedures of science, *i.e.*, demonstrate reliability. *Id.* at 591. The opinion must not be supported on speculation but, rather, appropriate validation. *Id.* If not grounded in an established scientific theory, the analysis must still be derived from the scientific method. *Id.* This analysis should be reviewed *de novo* to promote uniformity within the circuits.

Once the expert's methodology satisfies the rigors of *Daubert,* only half of the admissibility analysis is complete. The trial court's focus is then on the *relevance* of the opinion – which is guided by whether the opinion is based upon the facts of the case such that the opinion will assist the jury in determining a disputed fact. If the opinion is not based upon "reality" as defined by the evidence in the case before it, no amount of appropriate methodology will make the expert's opinion relevant.

Utilization of the general abuse of discretion standard has essentially eliminated the significance of the first prong of the *Daubert* analysis.

However, trial courts, as well as the courts of appeal, appear to have morphed the *Daubert* analysis until the proper two-step focus has been lost. *See e.g. First Marblehead Corp. v. House*, 541 F.3d 36, 40 (1st Cir. 2008); *Zarega Ave. Realty Corp. v. Horbeck*

Offshore Transp. LLC, 571 F.3d 206, 213 (2d Cir. 2009); *Waldorf v. Shuta*, 142 F.3d 601, 626-27 (3d Cir. 1998); *Westberry v. Gislaved Gummi AB*, 178 F.3d at 261; *In re Scrap Metal Antitrust Litigation*, 527 F.3d 517, 528 (6th Cir. 2008); *Synergetics Inc. v. Hurst*, 477 F.3d 949, 955-56 (8th Cir. 2007); *Eskra v. Provident Life & Acc. Ins. Co.*, 125 F.3d 1406, 1414 (11th Cir. 1997); *Raynor v. Merrell Pharma. Inc.*, 104 F.3d 1371, 1374 (C.A.D.C. 1997); *MEMC Elect. Mat'ls v. Mitsubishi Mat'ls Silicon Corp.*, 248 Fed. Appx. 199 (Fed. Cir. 2007).

This case highlights the extent to which the trial court has veered from the appropriate *Daubert* approach.

Friedman, the Government's expert, was highly qualified and a frequent expert witness on the issue of retrospective valuation of real estate. In this case, the Government hired him to opine on the "fair market value" of the real estate owned in part by a limited partnership included in the Estate's assets. Friedman's original retrospective analysis used the traditional sales comparison approach. Based upon the traditional method, Friedman's opinion was that the real property's fair market value on the alternate valuation date was $12.3 million.

After a three hour meeting with the Government's attorneys, Friedman decided to use a different methodology. The events at trial highlight the critical need for this Court to address this issue. Friedman admitted that his new methodology

- was not accepted within his field,
- had never been subjected to peer review,
- had never been published in professional publications, and
- to his knowledge, never used before.

The trial court overruled the Estate's *Daubert* objection. Using his new methodology, Friedman's opinion of fair market value as of the alternate valuation date grew astronomically. Now, based upon his invented methodology, his opinion became that the fair market value of the real property was $22.9 million on the alternate valuation date.

The trial court's response to the Estate's objections was an expression of confidence in the Estate's attorney's ability to cross-examine the expert. The critical problem with the trial court avoiding its *Daubert* responsibility was that the jury was exposed to a faulty opinion rendered by an obviously very qualified expert. It is unrealistic to expect that a jury could discern the errors of the "opinion" through cross-examination, once the trial court has accepted the methodology.

With the facts in this case, this Court can exercise its supervisory power to bring the circuits back to the principles underlying *Daubert* and clarify that the *Daubert* focus requires the trial court to fulfill its role with respect to an expert's methodology as the cornerstone question in this analysis. Because of the heightened acceptance of an expert's "opinion" by a

jury, the trial court's *Daubert* analysis cannot, as it seems to be doing, rely on vigorous cross-examination to cure its error. A two-step analysis, first focusing on whether

(i) the theory or technique can be and has been tested;

(ii) been subjected to peer review and publication;

(iii) whether the facts or data of a type reasonably relied upon by experts in that field forming opinions; and

(iv) whether the theory or technique is generally accepted within the technical community.

and a *de novo* review of this prong of the analysis would promote uniformity among the circuits.

Instead, in this case the expert was permitted to offer an opinion based upon a methodology that

(i) had never been tested;

(ii) had never been subjected to peer review;

(iii) had never been published; and

(iv) did not use facts or data similar to that reasonably relied upon by other experts in the field.

A review of the trial court's decision with differing standards in this case would have prevented a decision that challenged the viability of the *Daubert* requirements.

The Fifth Circuit's deviation from *Daubert* calls into question the standard adopted by the Tax Court and the Treasury for retrospective real estate appraisals. The United States Tax Court and the Treasury Regulations have recognized three accepted valuation techniques for real estate: comparable sales, income, and cost. *See Marine v. C.I.R.*, 92 T.C. 958, 983 (1989), *aff'd, without published opinion*, 921 F.2d 280 (9th Cir. 1991); Subchapter A, section 1.170A-1(c)(2) of the Treasury Regulations. Another court has held that "sales of comparable land in the area most accurately evidence fair market value." *See United States v. 75.13 Acres of Land*, 693 F.2d 813, 815 (8th Cir. 1982), *citing United States v. 3698.63 Acres of Land in Burleigh, Emmons, & Morton Counties, North Dakota*, 416 F.2d 65, 67 (8th Cir. 1969). These appraisal methods are recognized by the Uniform Standards of Professional Appraisal Practice. Despite the uniform recognition of only these three methods within the real estate appraisal field, the Fifth Circuit decision approved a radical deviation from the established methods and, as a result has cast doubt upon the validity of real property valuations across the country.

Friedman understood the traditional methods of valuation, and in fact, had used comparable sales for his initial determination. However, it did not result in a value that satisfied the Government. Subsequently, after a lengthy meeting with the Government's counsel and using a methodology based upon expressions of interest that Friedman admitted he had *never*

known to be used, published or reviewed by his peers, he was able to increase the value of the real property to a range acceptable to the Government. The Estate objected. However, despite the failure of the methodology to meet the *Daubert* standards, the trial court decided to rely on the Estate's cross-examination to cure its error.

D. The Fifth Circuit's decision is irreconcilable with 26 U.S.C. section 2036 because the Limited Partnership met all of the tests demonstrating lack of control and lack of marketability.

The value of a gross estate is determined by including the value of all property, real or personal, tangible or intangible. 26 U.S.C. §2031(a). The succeeding sections, including section 2036, modify this general statement as warranted by the circumstances existing in a particular estate.

When determining the question of the impact of lack of control or marketability on the fair market value of an ownership interest, the trial court's customary focus is on the magnitude of a discount, not whether a discount should be applied. With this decision, the Fifth Circuit has departed from the decisions in the other circuits. This Court needs to exercise its supervisory power to provide guidance to the lower courts that when the appropriate criteria are met, the discount must be greater than zero.

In December 1997, Mr. Levy transferred the ownership of a portion of his real property into a limited partnership properly formed under the laws of the State of Texas. In exchange, Mr. Levy acquired limited partnership interests, which passed to his estate upon his death.

After the Estate filed suit to recover the additional tax charged by the United States, the United States counterclaimed and asserted that 26 U.S.C. section 2036 controlled the value of the estate because the limited partnership had not been formed for a substantial, non-tax purpose. The Government advocated the limited partnership interests held by the Estate should not be discounted for lack of marketability or lack of control. However, the trial court found against the Government on this issue, as a matter of law. The Government did not challenge the ruling and the applicability of section 2036 was not a question presented to the jury. Nevertheless, the jury was asked to find the appropriate discount for lack of control and/or lack of marketability, but was not instructed that the amount must be greater than zero.

E. The decision of the Fifth Circuit is at odds with Texas statutes and 26 U.S.C. section 2036.

Despite complying in every respect with 26 U.S.C. section 2036 and Texas partnership law, the jury found, and the Fifth Circuit affirmed, that *no*

discount for lack of control or marketability should be applied in order to determine the fair market value of the limited partnership assignee interests. Typically where the requirements of section 2036 are satisfied, some discount is applied to calculate the fair market value. The Fifth Circuit is inapposite to the other circuits. As this Court has not addressed this issue, it is presented for review. Section 2036 *requires* that the decedent have relinquished control. Texas limited partnership law *requires* that limited partners have no ability to control the entity. To find zero discount of value when all of the section 2036 and Texas limited partnership law criteria were met is an oxymoron. Although the Fifth Circuit seemed to appreciate the conundrum during oral argument, it failed to reverse the trial court's decision. Nevertheless, it seems logical that the jury be required to find *some* discount is appropriate in order to calculate the fair market value of an interest in a properly constituted limited partnership. This court should find that the jury must properly be instructed that it cannot find zero under these circumstances.

F. The decision of the Fifth Circuit is contrary to the application of 26 U.S.C. section 2032.

This Court has not previously addressed the interpretation of 26 U.S.C. section 2032 under these circumstances, but addressing this issue will further provide clarity to the interpretation of this statute and is justified to protect judicial integrity and the rights of litigants.

Compliance with section 2032 has two components:

> No election may be made under this section with respect to an estate unless such election will decrease
>
> (1) the value of the gross estate
>
> and
>
> (2) the sum of the tax imposed by this chapter and the tax imposed by chapter 13 with respect to property includible in the decedent's gross estate (reduced by credits allowable against such taxes).

On the Form 706 tax return, the Estate claimed the following values:

Date of death: $7,422,678.00

A. V. date: $7,382,936.00[3]

The Government's evidence of value at trial:

Date of death: **no evidence**

A. V. date: $17,709,852.00[4]

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[3] In each of these values, $2,062,826 was attributed to the value of the real property or about 49.4% of the total fair market value of the real property.

[4] The jury found the total value of the real property was $25,000,000.00. Using the same percentage as was used on the Form 706 tax return, the Estate's share would be about $12,350,000.00.

As can be seen, the Estate complied with the statute and demonstrated that the value of the estate declined during that six-month period after the date of death. Additionally, the Government *stipulated* that the Estate properly elected the alternative valuation date. By so doing, the Government *agreed* (i) that the value of Levy's gross estate declined in value from the value as of the date of death *and* (ii) the Estate's federal tax liability decreased.

Over the Estate's objection, the only evidence presented by the Government was that the total fair market value of the real estate on the alternate valuation date was $22,900,000.00.[5] The only evidence of the estate's value as of the date of death was as stated on the Form 706 tax return: $7,422,678.00. The Government did not offer any additional evidence concerning the value of any of the other assets; therefore, these too were established by the Form 706 tax return. Thus, the established value as of the date of death, $7,422,678.00, was significantly smaller than both the $25,000,000.00 found by the jury or the $17,709,852.00 that could be extrapolated. In failing to offer evidence of value of the Estate as of the date of death, the Government had no evidence to support the jury's verdict. The Fifth Circuit ignored that the application of section 2032 required the date of death value must exceed the value as of the alternate valuation date and in this

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[5] Friedman's Opinion.

case it did not. This question has not been addressed by this Court, but is an important federal question that needs this Court's review and guidance.

By virtue of its challenge to the Estate's value on the alternate valuation date, the Government was required to present evidence of value as of the date of death to prove the value of the Estate declined. Because the Government presented no evidence of the value of the Estate's assets as of the date of Mr. Levy's death, the requirements of section 2032 were not met. This Court needs to address this issue and resolve the obvious confusion in the interpretation and application of the statute.

G. The proper application of 26 U.S.C. section 7491.

It is expected that the Government will argue section 2032 did not require it to present evidence because the Estate had the burden to prove entitlement to the refund it sought with the lawsuit. It is true that prior to the enactment of 26 U.S.C. section 7491 the Estate would have the entire burden of proof.[6] However, with the passage of section 7491, the allocation of the burden of proof changed. This is even more appropriate when one examines the interrelationship between sections 2032 and 7491. Under a plain reading of section 7491, the burden should have

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[6] *United States v. Janis*, 428 U.S. 433, 440 (1976).

shifted to the Government in this case on its affirmative defense. The Estate presented credible evidence regarding factual issues relevant to the controversy over the value of the Estate. At that point the burden of proof shifted to the Government with respect to these issues. Once the section 2036 issue was decided in the Estate's favor, all that remained was for the Government to prove the Estate's value for purposes of its offset claim. It does not appear that this Court, or any other court of appeal, has addressed the applicability or inapplicability of section 7491 where the value of an estate is being challenged by the Government after an estate claims an alternate value under section 2032.

The courts of appeals also do not have clear direction with respect to the allocation of the burdens when the Government asserts an affirmative defense. Under traditional allocations of the burden of proof, the Government should have had the burden to prove "its offset claim had sufficient substance that it was made in good faith, rather than for improper purposes of deterrence and harassment."[7] Again, it is expected the Government will argue it did not have the burden on its affirmative defense. The Government's position highlights the need for this Court to exercise its supervisory power and guide the lower courts in the proper interpretation and application of these

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[7] *See Ahmanson Foundation v. United States*, 674 F.2d 761, 777 (9th Cir. 1981).

statutes. The Estate requests the Court address these ancillary issues in order to provide uniformity among the circuits with respect to these issues.

CONCLUSION

Based on the foregoing, Michael R. Levy, as Independent Executor of the Estate of Meyer Levy, Deceased, respectfully requests that the Court grant this Petition for Writ of Certiorari in this matter.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 09-51082

MICHAEL R. LEVY, as
Independent Executor of the
Estate of Meyer Levy, Deceased,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:07-CV-339

(Filed Dec. 1, 2010)

Before: JONES, Chief Judge, and REAVLEY and HAYNES, Circuit Judges.

PER CURIAM:*

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

The Estate of Meyer Levy seeks a refund of $3,236,377 in estate taxes claiming the assessment overvalued Plano property at $23,286,412 and undervalued the discount of the partnership interest. Judgment in favor of the government is based on the jury verdict of $25 million value without allowing any discount for lack of control and marketability due to partnership ownership. We affirm the judgment and address the numerous points of error raised by the Estate.

Rulings on Evidence

The Estate argues that the trial court erred when it allowed the admission of (1) evidence of the ongoing negotiations over the sale of the property, specifically the offers and proposals; (2) evidence of the listing price of the property, and the ultimate sale price of the property; (3) valuation testimony by the Government's expert based on flawed methodology; and (4) opinion testimony by a lay witness and hearsay testimony. Admission of evidence is reviewed for abuse of discretion. *Paz v. Brush Engineered Materials, Inc.*[1] "A trial court abuses its discretion when its ruling is based on an erroneous view of the law or a clearly erroneous assessment of the evidence."[2]

The Estate argues that the evidence concerning the negotiations over the property were not relevant

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[1] 555 F.3d 383, 387 (5th Cir. 2009).

[2] *Id.* (internal quotation omitted).

to the determination of the fair market value of the property on September 25, 2001. Offers to buy and sell property may not be admissible as evidence of its fair market value. *Sharp v. United States.*[3] It depends on the specifics of each case. *See Univ. Computing Co. v. Lykes-Youngstown Corp.*[4] "In virtually every case which has utilized this general rule, the offers came from third parties, frequently unidentified, and were mere hearsay. Further, in most of these cases there was no evidence that the offeror had the type of expert qualifications which would have entitled him to testify as to his opinion on value had he been called at trial."[5] Here, the proposals came from identified, sophisticated developers who could be reasonably expected to have investigated the value of the land before making a proposal. And, presumably the developers could have been called to testify had the Estate desired to test their knowledge under cross-examination.

Moreover, we have held that offers of purchase were admissible as evidence of fair market value when they were part of ongoing negotiations resulting in a contract with substantially the same terms. *Sammons v. United States.*[6] With one exception, which the parties agreed was unreasonable, the offers on the property were between $20 million and $25

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[3] 191 U.S. 341, 348, 24 S. Ct. 114, 115 (1903).

[4] 504 F.2d 518, 545-46 (5th Cir. 1974).

[5] *Id.*

[6] 433 F.2d 728, 731 (5th Cir. 1970).

million. The Estate resolutely held out for $25 million throughout all of the negotiations. And, the final sale price was $25 million. The evidence of the negotiations was consistent with the actual sale and was admissible.

Additionally, the Estate contends that the evidence of the final sale price was inadmissible because the sale: (1) was too remote in time, and (2) was contingent on rezoning. To be relevant, the eventual sale of the property must be within a reasonable time. *Atlantic Coast Line R. Co. v. United States*.[7] We have held that "[i]t is well settled that the admissibility of comparable sales . . . is a matter within the peculiar discretion of the trial judge." *United States v. Certain Land in City of Fort Worth, Tarrant County, Tx.*[8] In *Jayson v. United States*, we held that a trial court did not abuse its discretion in admitting evidence of the sale of comparable property three and a half years after the valuation date.[9] Here, the contract for sale was signed two years after the valuation date, and unlike the comparison in *Jayson*, the sale evidence was for the actual land at issue, rather than comparable land. Additionally, the Estate's expert testified that the Plano real estate market was relatively flat – increasing approximately 3% – so the sales price would be an accurate comparator.

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[7] 132 F.2d 959, 963 (5th Cir. 1943) ("[A]n actual sale remote in time affords no standard.").

[8] 414 F.2d 1029, 1031 (5th Cir. 1969).

[9] 294 F.2d 808, 810 (5th Cir. 1961).

The Estate further argues that the sale price was inadmissible because the rezoning of the land to single-family and retirement community use was not foreseeable. Levy himself had tried to have the property rezoned to no effect. They argue that the eventual sales price was unforeseeable and, therefore, the land must instead be valued as though it is agricultural land. We disagree. Levy's attempted rezoning was aggressive and unrealistic. And, the Plano comprehensive land use plan anticipated that the property would be rezoned to at least single-family homes. That the property would be rezoned to allow for some type of development was entirely foreseeable. The district court did not abuse its discretion in admitting evidence of the actual sale price of the property.

Nor did the court abuse its discretion in allowing testimony regarding the listing price of the property. As long as it is not based on pure speculation, "[i]n general, an owner is competent to give his opinion on the value of his property." *King v. Ames*[10] His testimony is admissible "because of the presumption of special knowledge that arises out of ownership of the land." *LaCombe v. A-T-O, Inc.*[11]

The Estate also contends that the district court erred when it denied the Estate's motion to exclude

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[10] 179 F.3d 370, 377 (5th Cir. 1999) (quotation marks and citation omitted).

[11] 679 F.2d 431, 434 (5th Cir. 1982) (quotation marks and citation omitted).

the expert testimony of Jack P. Friedman – the Government's valuation expert. We review a trial court's decision to admit expert testimony for abuse of discretion. *United States v. Cooks*.[12] "[W]e have recognized that district courts are given wide latitude in determining the admissibility of expert testimony, and the discretion of the trial judge will not be disturbed on appeal unless manifestly erroneous."[13] "Manifest error is one that is plain and indisputable, and that amounts to a complete disregard of the controlling law." *Guy v. Crown Equip. Corp.*[14]

Admission of expert testimony is governed by Rule 702 of the Federal Rules of Evidence as further developed by the Supreme Court in *Daubert v. Merrill Dow Pharmaceuticals, Inc.*[15] The only part of Rule 702 and *Daubert* that the Estate urges on appeal is the methodology Friedman used to arrive at his valuation of the property, which the Estate argues was novel and likely invalid. Specifically, the Estate contends that using offers as part of his basis for valuation was

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[12] 589 F.3d 173, 179 (5th Cir. 2009). We note that the Estate cites *Caracci v. Comm'r of Internal Revenue*, 456 F.3d 444, 456 (5th Cir. 2006), and argues that we review the methodology used to determine value *de novo*. *Caracci* is inapposite because there we reviewed the *trial court's* valuation methodology, not the admission of expert testimony.

[13] *Cooks*, 589 F.3d at 179 (internal quotations and ellipses omitted).

[14] 394 F.3d 320, 325 (5th Cir. 2004) (internal quotation omitted).

[15] 509 U.S. 579, 113 S. Ct. 2786 (1993).

an "unrecognized appraisal method" and that Friedman's assumption that the property would be rezoned improperly relied on hindsight rather than on facts known to the parties at the time. Because we have already recognized the admissibility of offers under the circumstances of this case, we cannot say that the court abused its discretion in permitting Friedman to refer to such offers, with appropriate contingencies, in his valuation analysis. And, as explained above, Friedman's assumption that the property would be rezoned for single-family housing was reasonable. The trial court did not abuse its discretion in admitting Friedman's expert testimony.

The Estate also argues that the trial court improperly allowed Allen Jordan – the Estate's real estate broker – to testify as to Levy's desired price; to describe the property as the "crown jewel of undeveloped real estate in the city of Plano, Texas"; to define "contract of sale" and "letter of intent"; and to opine as to the legitimacy of the offers on the property from the various developers, constituting hearsay and impermissible opinion testimony. Pursuant to Rule 803(1), testimony which "describ[es] or explain[s] an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter" is not hearsay.[16] Lay witness opinion testimony is governed by Rule 701, which provides that lay witness testimony "in the form of opinions or

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[16] FED. R. EVID. 803(1).

inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702."[17]

Jordan testified based on his experience as a real estate broker, and his familiarity with the property as its listing agent and as a long-time resident of Plano. We find no place in the record – and the Estate cites none – where Jordan testified that Levy told Jordan that he wanted a particular price for the property. Jordan did testify to the price at which he listed the property, but he is allowed to testify regarding his own actions. As to Jordan's statement that the property was the crown jewel of Plano, that statement, while colorful, is rationally based on Jordan's perceptions as an experienced real estate broker and Planoite. Additionally, as admonished by the trial court, Jordan was careful to define "contract of sale" and "letter of intent" based on his own understanding of the terms as they were used in his business as a realtor. This testimony was proper lay testimony because it "result[ed] from a process of reasoning familiar with everyday life . . . [rather than] a process of reasoning which can be mastered only by specialists in the field." *United States v. Yanez Sosa*.[18]

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[17] FED. R. EVID. 701.

[18] 513 F.3d 194, 200 (5th Cir. 2008) (citing FED. R. EVID. 701, Advisory Committee Notes to 2000 Amendments).

Nor is Jordan's testimony regarding the offers improper, because he testified only as to his firsthand knowledge of the negotiations and his impressions based on his participation in those negotiations.

Denial of New Trial

The Estate argues that the trial court committed reversible error when it denied the Estate's Rule 59 motion for new trial on the value of the property and the discount because the jury's verdict was against the great weight of the evidence. "[W]e review the denial of a motion for new trial brought on the ground that the verdict is against the great weight of the evidence for abuse of discretion, which we have held to mean that the denial will be affirmed unless there is a clear showing of an absolute absence of evidence to support the jury's verdict." *Rivera v. Union Pacific R. Co.*[19] We will not disturb the jury's verdict unless the Government failed to advance even marginal evidence in support of its position.[20]

The record contains ample evidence to support the jury's verdict valuing the property at $25 million. The Estate listed the property, and eventually sold

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[19] 378 F.3d 502, 506 (5th Cir. 2004) (internal quotation omitted); *see also Whitehead v. Food Max of Miss., Inc.*, 163 F.3d 265, 269 (5th Cir. 1998) ("The district court has sound discretion to grant or deny new trial motions; we affirm absent a clear showing that this discretion has been abused.") (internal quotation omitted).

[20] *Riviera*, 378 F.3d at 506.

the property, for $25 million. It was immediately resold for $26.5 million. Sophisticated developers with no stake in the current litigation engaged in ongoing negotiations for the property for prices in the $20-25 million range. The Estate's expert testified that the market in Plano remained relatively flat during the period between levy's death and the sale of the property. Also Jordan testified regarding the value of the property. Any of these provides sufficient support for the jury's verdict on the property.

The jury verdict regarding the discount also finds support in the record. The partnership agreement itself would be sufficient evidence. The jury could have rationally found that no discounts for lack of control or marketability were merited because the Estate controlled the general partner interest, which had nearly unfettered control over the Partnership's assets. The trial court did not abuse its discretion when it denied the Estate's motion for new trial.

Denial of Judgment as a Matter of Law

The Estate argues that the trial court erred when it denied the Estate's Rule 50 motion for judgment as a matter of law. "A [motion for judgment as a matter of law] challenges the legal sufficiency of the evidence to support the verdict." *Hodges v. Mack Trucks, Inc.*[21] "Our review is *de novo*, using the same standard as

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[21] 474 F.3d 188, 195 (5th Cir. 2006).

the district court."[22] "In reviewing the evidence, we draw all reasonable inferences in the non-movant's favor, and disregard all evidence favorable to the moving party that the jury is not required to believe."[23] "That is, the court should give credence to the evidence favoring the nonmovant as well as that evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that th[e] evidence comes from disinterested witnesses." *Reeves v. Sanderson Plumbing Prods. Inc.*[24]

The Estate contends that the jury arbitrarily disregarded unequivocal, uncontradicted, and unimpeached testimony of an expert witness, bearing on technical questions of causation beyond the competence of lay people. The Government counters that the jury had the partnership agreement in evidence from which it could have determined that there was no lack of control or marketability. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge," *Palasota v. Haggar Clothing Co.*,[25] including the weight to be given expert witnesses. *V & S Ice Mach. Co. v. Eastex*

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[22] *Id.*

[23] *Id.* (internal quotation omitted).

[24] 530 U.S. 133, 151, 120 S. Ct. 2097, 2111 (2000) (internal quotation omitted).

[25] 499 F.3d 474, 480 (5th Cir. 2007) (internal quotations omitted).

Poultry Co.[26] "[E]vidence in the record can support a jury verdict if it is of such quality and weight that reasonable and fair-minded individuals in the exercise of impartial judgment might reach different conclusions." *Green v. Adm'rs of Tulane Educ. Fund.*[27] We have a higher opinion of the ability of this jury to understand that the question of control and marketability was shown by the control of the partnership's assets.

Estoppel

For the first time on appeal, the Estate argues that the Government is estopped from challenging the Estate's valuation of the property because the IRS approved the Estate's election under § 2032. The Estate contends that when the Government agreed that the election of the alternate date under § 2032 was proper, and thus that the value of the estate as a whole declined after Levy's death on March 25, 2001, it must also have agreed that the Estate's valuation of the property as of March 25, 2001, was proper. "Under our general rule, arguments not raised before the district court are waived and will not be considered on appeal unless the party can demonstrate 'extraordinary circumstances.'" *State Indus. Prods.*

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[26] 437 F.2d 422, 426 (5th Cir. 1971).

[27] 284 F.3d 642, 653 (5th Cir. 2002), *abrogated on other grounds by Burlington N. & Santa Fe Ry. Co. v. White,* 548 U.S. 53, 126 S.Ct. 2405 (2006).

Corp. v. Beta Tech. Inc.[28] "Extraordinary circumstances exist when the issue involved is a pure question of law and a miscarriage of justice would result from our failure to consider it." *Dunbar v. Seger-Thomschitz.*[29] There is no miscarriage of justice when an error is not plain or obvious. *Conley v. Bd. of Trs. of Grenada County Hosp.*[30] Since estoppel is an equitable doctrine and the Estate characterized the issue as one of first impression, the Estate waived this argument by failing to raise it at the trial court level.

Jury Instructions

The Estate contends that the trial court erred when it (1) improperly instructed the jury on the definition of fair market value; (2) improperly instructed the jury regarding the Discount; (3) placed the burden of proof on the Estate; (4) submitted the question of the Discount to the jury; and (5) failed to give an instruction to cure any bias against the Estate arising from the Government's presentation of evidence in support of its § 2036 affirmative defense. "In reviewing the jury charge we ask whether the jury charge properly stated the applicable law and, if not, whether the challenged instruction affected the outcome of the case." *Smith v. Xerox Corp.*[31]

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[28] 575 F.3d 450, 456 (5th Cir. 2009).

[29] 615 F.3d 574, 576 (5th Cir. 2010).

[30] 707 F.2d 175, 178 (5th Cir. 1983).

[31] 602 F.3d 320, 325 (5th Cir. 2010).

First, the Estate argues that because the definition of fair market value did not specify that the value is determined by a *hypothetical* willing buyer and seller, the jury gave improper weight to Levy's desire to sell the land for $25 million. While the Estate did not specifically raise this objection at the Rule 51(b) hearing, the word "hypothetical" was in its requested charge and the trial court issued a blanket ruling covering requested but not incorporated jury instructions. Their objection, at least on this point, is therefore arguably preserved.[32]

The trial court instructed the jury that "the 'fair market value' is the cash price at which property would change hands between a willing buyer and a willing seller when the buyer is under no compulsion to buy and the seller is not under any compulsion to sell and both the buyer and seller have reasonable knowledge of all relevant facts." The Estate is correct that "[t]he buyer and seller are hypothetical, not actual persons[.]" *Estate of Jameson v. Comm'r of Internal Revenue*.[33] However, the instruction given by the court does not suggest otherwise and is a correct statement of the law, closely mirroring the Fifth

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[32] *But see* FED. R. CIV. P. 51(c)(1) ("A party who objects to an instruction or the failure to give an instruction must do so on the record, stating distinctly the matter objected to and the grounds for the objection."); *Positive Black Talk Inc. v. Cash Money Records, Inc.*, 394 F.3d 357, 368 (5th Cir. 2004), *abrogated on other grounds by Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237 (2010).

[33] 267 F.3d 366, 370 (5th Cir. 2001).

Circuit's Pattern Jury Instructions' definition of fair market value.[34] The instruction described a willing buyer and a willing seller rather than the actual buyer and the actual seller. The jury would not have been misled by this instruction. The court therefore properly instructed the jury on the definition of fair market value.

Second, the Estate argues that the trial court erred when it used the phrase "if any" in its instruction on the Discount, improperly suggesting that a finding of no discount could be appropriate. According to the Estate, both the Government's failure to prevail on its § 2036 defense and the language of the partnership agreement meant that the Estate was entitled to at least some discount. However, § 2036 and the Discount amount are not linked in the way the Estate urges. The Government's § 2036 affirmative defense required proof that the Partnership had no legitimate non-tax purpose. If the Government met its burden of proof on this issue, then the Partnership would not have been entitled to a Discount. But, it does not follow that a limited partner's interest in a Partnership with a legitimate non-tax purpose is automatically worth less than 100%. The jury was free to make its finding and was not misled.

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[34] FIFTH CIRCUIT PATTERN JURY INSTRUCTIONS (CIVIL) § 13.3 (2009) ("Fair market value means the amount a willing buyer would have paid a willing seller in an arms-length transaction, when both parties are fully informed about all of the advantages and disadvantages of the property, and neither is acting under any compulsion to buy or sell.").

The Estate's three remaining objections to the jury instructions were not raised at the Rule 51(b) hearing, directly or indirectly. Tardy jury instruction objections are reviewed, if at all, under the plain error standard. *Tompkins v. Cyr.*[35] To succeed on plain error review, the Estate must show "(1) that an error occurred; (2) that the error was plain, which means clear or obvious; (3) the plain error must affect substantial rights; and (4) not correcting the error would seriously affect the fairness, integrity or public reputation of judicial proceedings." *Highlands Ins. Co. v. Nat'l Union Fire Ins. Co.*[36] "It is the unusual case that will present such an error."[37]

First, the Estate argues that the trial court improperly placed the burden of proof on it for two reasons. The Estate contends that 26 U.S.C. § 7491 shifts the burden of proof to the Government if "a taxpayer introduces credible evidence with respect to any factual issue relevant to ascertaining the liability of the taxpayer."[38] This is the Estate's suit for refund and the Estate proposed a jury instruction stating that it had to prove every essential element of its refund claim by a preponderance of the evidence. Along the same lines, the Estate next argues that

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[35] 202 F.3d 770, 783 (5th Cir. 2003); *see also* FED. R. CIV. P. 51, Notes to 2003 Amendments.

[36] 27 F.3d 1027, 1032 (5th Cir. 1994) (internal quotation omitted).

[37] *Id.*

[38] 26 U.S.C. § 7491(a)(1).

because the Government asserted § 2036 as an affirmative defense, it should have had the burden of proof on the Discount issue. But, the Government's § 2036 affirmative defense – on which it would have had the burden of proof – did not go to the jury. The Government's § 2036 defense has no bearing on the Estate's burden to prove its claim as presented in the jury instructions.

Second, the Estate argues that trial court's instruction on how to calculate the discount confused the jury because it referred to the Estate's net assets rather than the Estate's limited partner assignee interest in the Partnership. We disagree. The jury instruction specifically stated that "[t]he discount to be applied, if any, to the net asset value of the partnership discount determines the fair market value of the partnership interest." We see no likelihood of confusion from this instruction. The instruction regarding the Discount is therefore not plainly erroneous.

Third, the Estate also contends that the question regarding the Discount should never have gone to the jury because the parties had stipulated that the court would determine the Discount. The parties stipulated that "any disputed issues of fact that are necessary to determine the tax refund owed to the Estate, if any, other than disputed fact issues relating to the fair market value of the Plano property and to the factors underlying the Government's affirmative defense of 'offset' under Section 2036 should be heard and determined by the Court, not by the jury, after the jury returns its verdict." Despite this stipulation in

the joint proposed pretrial order, at no point did the Estate object to the presence of a jury question or the instruction on the Discount. The inclusion was not reversible error, because even if it were error to submit the question to the jury – and we do not so hold – the error was not plain because as the Estate points out "[n]o court has squarely addressed whether a joint stipulation can be waived."

And last, the Estate argues that the evidence introduced by the Government in support of its § 2036 affirmative defense led to an accumulation of evidence concerning Levy's alleged bad faith in forming the Partnership. The Estate maintains that the trial court erred when it failed to instruct the jury to cure the harm done by this improper evidence. We conclude it was not plain error. As we outlined above, the record contains sufficient evidence to support the jury's finding that the Partnership was not entitled to a discount absent any allegedly improper evidence of bad faith.[39]

AFFIRMED.

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[39] Although we have declined to set aside the jury's verdict of zero discount, we note that the actual discount applied in taxing the Estate was thirty percent. Given the valuation found by the jury, it would have had to find a discount of larger than thirty percent for the verdict to make a difference to the judgment in this case.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

MICHAEL R. LEVY, AS INDEPENDENT EXECUTOR OF THE ESTATE OF MEYER LEVY, DECEASED, PLAINTIFF,	§	CAUSE NO. A-07-CA-339-LY
V.	§	
THE UNITED STATES OF AMERICA, DEFENDANT	§	

ORDER

(Filed Nov. 26, 2008)

Before the Court are the following motions, responses, and replies: (1) Plaintiff's Motion to Exclude Report and Proposed Expert Testimony of Jack P. Friedman filed July 14, 2008 (Doc. #14), United States' Opposition to Plaintiff's Motion to Exclude Report and Proposed Expert Testimony of Jack P. Friedman filed July 25, 2008 (Doc. #15), Plaintiff's Reply in Support of Motion to Exclude Proposed Expert Testimony of Jack P. Friedman filed August 4, 2008 (Doc. #17), and Plaintiff's Amended Reply in Support of Motion to Exclude Proposed Expert Testimony of Jack P. Friedman filed September 4, 2008 (Doc. #26); (2) Plaintiff's Motion for Partial Summary Judgment on Defendant's Affirmative Defense of Offset filed July 31, 2008 (Doc. #16), United States'

Response in Opposition to Plaintiff's Motion for Partial Summary Judgment on Defendant's Affirmative Defense of Offset filed August 29, 2008 (Doc. #21), and Plaintiff's Reply in Support of Motion for Partial Summary Judgment on Defendant's Affirmative Defense of Offset filed September 9, 2008 (Doc. #29). Having reviewed the motions, responses, and replies, the Court renders the following rulings.

DAUBERT MOTION

Rule 702 of the Federal Rules of Evidence governs the admissibility of expert testimony, providing that:

> [i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

FED. R. EVID. 702. Rule 702 was amended to incorporate the principles first articulated by the United States Supreme Court in *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). *See* FED. R. CIV. P. 702, Adv. Comm. Notes (2000). Under *Daubert*, expert testimony is admissible only if the

proponent demonstrates that: (1) the expert is qualified; (2) the evidence is relevant to the suit; and (3) the evidence is reliable. *See Moore v. Ashland Chem. Inc.*, 151 F.3d 269, 276 (5th Cir. 1998); *Watkins v. Telsmith, Inc.*, 121 F.3d 984, 989 (5th Cir. 1997).

Following *Daubert* and its progeny, trial courts act as gatekeepers, overseeing the admission of scientific and nonscientific expert testimony. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999). Trial courts must make "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert*, 509 U.S. at 592-93. In carrying out this task, district courts have broad latitude in weighing the reliability of expert testimony for admissibility. *See Kumho Tire Co.*, 526 U.S. at 152. The district court's responsibility "is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Id.*

Daubert provides the analytical framework for determining whether expert testimony is admissible under Rule 702 of the Federal Rules of Evidence. *See Kumho Tire Co.*, 526 U.S. at 141. This *Daubert* framework includes many factors that can be used to determine the admissibility of expert testimony, including, but not limited to, whether the expert's theory or technique: (1) can be or has been tested;

(2) has been subjected to peer review and publication; (3) has a known or potential rate of error or standards controlling its operation; and (4) is generally accepted in the relevant scientific community. *See Daubert*, 509 U.S. at 593-94. Not every *Daubert* factor will be applicable in every situation and a court has discretion to consider other factors it deems relevant. *See Kumho Tire*, 526 U.S. at 151-52. The Fifth Circuit has directed that, "[i]n the vast majority of cases, the district court first should decide whether the factors mentioned in *Daubert* are appropriate." *Black v. Food Lion, Inc.*, 171 F.3d 308, 311-12 (5th Cir. 1999). Whether *Daubert's* suggested indicia of reliability apply to any given testimony is a fact-specific inquiry dependant on the nature of the issue at hand, the witness's particular expertise, and the subject of the testimony. *Seatrax, Inc. v. Sonbeck Int'l, Inc.*, 200 F.3d 358, 372 (5th Cir. 2000).

Although the *Daubert* analysis is applied to ensure expert witnesses have employed reliable principles and methods in reaching their conclusions, the test does not judge the expert conclusions themselves. *Daubert*, 509 U.S. at 594-95. The focus must be solely on principles and methodology rather than the conclusions generated. *Id.* at 595. However, conclusions and methodology are not entirely distinct from one another. *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997). Nothing in *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. *Id.* A court may conclude that

there is simply too great an analytical gap between the data and the opinion proffered. *Id.*

Notwithstanding the dictates of *Daubert* and its progeny, "the rejection of expert testimony is the exception rather than the rule." FED. R. CIV. P. 702, Adv. Comm. Notes (2000). *Daubert* did not work a "'seachange over federal evidence law,'" and "'the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system.'" *See id.* (quoting *United States v. 14.38 Acres of Land, More or Less, Situated in Leflore County, Mississippi,* 80 F.3d 1074, 1078 (5th Cir. 1996)). As *Daubert* recognized, "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert,* 509 U.S. at 596.

This Court's role as a gatekeeper is not intended to supplant the adversary system in which vigorous cross-examination, presentation of contrary evidence, and careful instruction on burden of proof are means of attacking shaky but admissible evidence. *See id.* Having reviewed the deposition testimony and expert report of Jack P. Friedman, the Court concludes that Dr. Friedman's use of offers is supported by established standards and his assumptions are reasonable and foreseeable. The criticisms raised about his opinions and conclusions can be adequately addressed at trial through cross-examination.

IT IS THEREFORE ORDERED that Plaintiff's Motion to Exclude Report and Proposed Expert Testimony of Jack P. Friedman filed July 14, 2008 (Doc. #14) is **DENIED**.

MOTION FOR PARTIAL SUMMARY JUDGMENT

Having carefully reviewed the motion for partial summary judgment, response, and replies, as well as the summary-judgment proof of the parties, the Court finds that one or more issues of material fact exist in this cause that require full record development therefore rendering the issues raised in the motion not properly susceptible to summary judgment.

IT IS THEREFORE ORDERED that Plaintiff's Motion for Partial Summary Judgment on Defendant's Affirmative Defense of Offset filed July 31, 2008 (Doc. #16) is **DENIED**.

SIGNED this 26th day of November, 2008.

/s/ Lee Yeakel
LEE YEAKEL
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

MICHAEL LEVY, AS INDEPENDENT EXECUTOR OF THE ESTATE OF MEYER LEVY, DECEASED	§	CIVIL ACTION NO. A-07-CA-339-LY
V.	§	
THE UNITED STATES OF AMERICA	§	

FINAL JUDGMENT

(Filed Sep. 29, 2009)

This action was called for jury trial on February 23, 2009, the issues were tried, and the jury rendered its unanimous verdict of (i) $25,000,000 in response to the Jury Question "What was the fair market value of the Plano property as of September 25, 2001," and (ii) 0% in response to the Jury Question "What percentage for lack of marketability and lack of control, if any, should be applied to the net asset value of the Meyer Levy Limited Partnership as of September 25, 2001." It is therefore

ORDERED, ADJUDGED AND DECREED that the Clerk enter judgment in favor of Defendant United States of America and against Plaintiff, Michael Levy, as Independent Executor of the Estate of Meyer Levy, Deceased; and it is

ORDERED, ADJUDGED AND DECREED that the Plaintiff, Michael Levy, as Independent Executor

of the Estate of Meyer Levy, Deceased, recover nothing, except that Plaintiff is entitled to receive a refund of $750,085.00 for the state death tax credit pursuant to 26 U.S.C. § 2011 at the time that the Plaintiff substantiates payment of the state death tax once this Judgment is final and no longer is subject to appeal.

Defendant, United States of America, shall recover its costs from Plaintiff, Michael Levy, as Independent Executor of the Estate of Meyer Levy, Deceased. This is a FINAL JUDGMENT that may be appealed.

Signed this 29th day of September, 2009.

/s/ Lee Yeakel
UNITED STATES
DISTRICT JUDGE

Agreed as to **Form Only**:

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ATTORNEYS FOR DEFENDANT

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 09-51082

MICHAEL R. LEVY, as
Independent Executor of the
Estate of Meyer Levy, Deceased,

Plaintiff-Appellant

v.

UNITED STATES OF AMERICA,

Defendant-Appellee

Appeal from the United States District Court for the
Western District of Texas, Austin

ON PETITION FOR REHEARING

(Filed Jan. 26, 2011)

Before JONES, Chief Judge, and REAVLEY and HAYNES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

/s/ Thomas Reavley
United States Circuit Judge

TITLE 26 – INTERNAL REVENUE CODE

§ 2032. Alternate valuation

(a) General

The value of the gross estate may be determined, if the executor so elects, by valuing all the property included in the gross estate as follows:

(1) In the case of property distributed, sold, exchanged, or otherwise disposed of, within 6 months after the decedent's death such property shall be valued as of the date of distribution, sale, exchange, or other disposition.

(2) In the case of property not distributed, sold, exchanged, or otherwise disposed of, within 6 months after the decedent's death such property shall be valued as of the date 6 months after the decedent's death.

(3) Any interest or estate which is affected by mere lapse of time shall be included at its value as of the time of death (instead of the later date) with adjustment for any difference in its value as of the later date not due to mere lapse of time.

(b) Special rules

No deduction under this chapter of any item shall be allowed if allowance for such items is in effect given by the alternate valuation provided by this section. Wherever in any other subsection or section of this chapter reference is made to the value of property at the time of the decedent's death, such

reference shall be deemed to refer to the value of such property used in determining the value of the gross estate. In case of an election made by the executor under this section, then –

(1) for purposes of the charitable deduction under section 2055 or 2106(a)(2), any bequest, legacy, devise, or transfer enumerated therein, and

(2) for the purpose of the marital deduction under section 2056, any interest in property passing to the surviving spouse,

shall be valued as of the date of the decedent's death with adjustment for any difference in value (not due to mere lapse of time or the occurrence or non-occurrence of a contingency) of the property as of the date 6 months after the decedent's death (substituting, in the case of property distributed by the executor or trustee, or sold, exchanged, or otherwise disposed of, during such 6-month period, the date thereof).

(c) Election must decrease gross estate and estate tax

No election may be made under this section with respect to an estate unless such election will decrease –

(1) the value of the gross estate, and

(2) the sum of the tax imposed by this chapter and the tax imposed by chapter 13 with respect to property includible in the decedent's

gross estate (reduced by credits allowable against such taxes).

(d) Election

(1) In general

The election provided for in this section shall be made by the executor on the return of the tax imposed by this chapter. Such election, once made, shall be irrevocable.

(2) Exception

No election may be made under this section if such return is filed more than 1 year after the time prescribed by law (including extensions) for filing such return.

TITLE 26 – INTERNAL REVENUE CODE

§ 2036. Transfers with retained life estate

(a) General rule

The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death –

(1) the possession or enjoyment of, or the right to the income from, the property, or

(2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom.

(b) Voting rights

(1) In general

For purposes of subsection (a)(1), the retention of the right to vote (directly or indirectly) shares of stock of a controlled corporation shall be considered to be a retention of the enjoyment of transferred property.

(2) Controlled corporation

For purposes of paragraph (1), a corporation shall be treated as a controlled corporation if, at

any time after the transfer of the property and during the 3-year period ending on the date of the decedent's death, the decedent owned (with the application of section 318), or had the right (either alone or in conjunction with any person) to vote, stock possessing at least 20 percent of the total combined voting power of all classes of stock.

(3) Coordination with section 2035

For purposes of applying section 2035 with respect to paragraph (1), the relinquishment or cessation of voting rights shall be treated as a transfer of property made by the decedent.

(c) Limitation on application of general rule

This section shall not apply to a transfer made before March 4, 1931; nor to a transfer made after March 3, 1931, and before June 7, 1932, unless the property transferred would have been includible in the decedent's gross estate by reason of the amendatory language of the joint resolution of March 3, 1931 (46 Stat. 1516).

TITLE 26 – INTERNAL REVENUE CODE

§ 7491. Burden of proof

(a) Burden shifts where taxpayer produces credible evidence

(1) General rule

If, in any court proceeding, a taxpayer introduces credible evidence with respect to any factual issue relevant to ascertaining the liability of the taxpayer for any tax imposed by subtitle A or B, the Secretary shall have the burden of proof with respect to such issue.

(2) Limitations

Paragraph (1) shall apply with respect to an issue only if –

(A) the taxpayer has complied with the requirements under this title to substantiate any item;

(B) the taxpayer has maintained all records required under this title and has cooperated with reasonable requests by the Secretary for witnesses, information, documents, meetings, and interviews; and

(C) in the case of a partnership, corporation, or trust, the taxpayer is described in section 7430(c)(4)(A)(ii).

Subparagraph (C) shall not apply to any qualified revocable trust (as defined in section 645(b)(1)) with respect to liability for tax for any taxable year ending after the date of the decedent's death

and before the applicable date (as defined in section 645(b)(2)).

(3) Coordination

Paragraph (1) shall not apply to any issue if any other provision of this title provides for a specific burden of proof with respect to such issue.

(b) Use of statistical information on unrelated taxpayers

In the case of an individual taxpayer, the Secretary shall have the burden of proof in any court proceeding with respect to any item of income which was reconstructed by the Secretary solely through the use of statistical information on unrelated taxpayers.

(c) Penalties

Notwithstanding any other provision of this title, the Secretary shall have the burden of production in any court proceeding with respect to the liability of any individual for any penalty, addition to tax, or additional amount imposed by this title.